APPENDIX A

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

United States of America

v.

JERAL BLISS NICKERSON

No. T- CR-856

On this 14th day of December, 1966 came the attorney for the government and the defendant appeared in person and[1] by court-appointed counsel Donald Deam at Topeka, Kansas.

It is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty returned by the Court on December, 14, 1966 of the offense of being a male citizen of the United States between the age of 18 and 26 years and having registered with his local draft board as required by the Selective Service Act of 1948 and having received from his local draft board notice to report for induction on December 20, 1965, knowingly and willfully failed, neglected and refused to present himself for induction into the Armed Forces of the United States, in violation of 50 USC, Appendix, 462, as charged[3] in Indictment of one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required.

It Is Adjudged that the defendant is guilty as charged and convicted.

The Court finds that the defendant was twenty-four years of age at the date of conviction and is suitable for handling as a Young Adult Offender (18 USC 4209).

It Is Adjudged that[3] the defendant is hereby committed to the custody of the Attorney General or his authorized representative as a Young Adult Offender for observation and study pursuant to 18 USC 5010(e), the results of such study to be reported to the Court by the Youth Correction Division of the United States Board of Parole within sixty (60) days, or such additional period as the Court may grant, at which time the defendant shall be returned to the Court for imposition of such sentence as the Court may then find to be appropriate.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPROVED:

/s/ Benjamin E. Franklin
Assistant U. S. Attorney

/s/ George Templar
United States District Judge.

_____
Clerk.

[4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceeding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. T-CR-856
JERAL BLISS NICKERSON, Defendant.	)	

FACTS SPECIALLY FOUND AT DEFENDANT'S REQUEST

On October 24, 1966 this cause came on for trial before the Court, a jury trial having been knowingly and understandingly waived in writing by defendant, with approval of his attorney and the Court and the consent of the government. Following the introduction of evidence by the parties the Court directed that the matter be continued until December 14, 1966 when the matter came further on for hearing and trial before the Court. Thereupon the parties having advised the Court that they had no further evidence to submit, the Court entered its judgment convicting the defendant, Jeral Bliss Nickerson, of the charge of willfully failing and refusing to present himself for induction into the Armed Forces of the United States as required by the Selective Service Act of 1948 after having received notice from his Local Draft Board to report for induction.

At the conclusion of the trial, defendant requested that the Court should in addition to the general finding of guilty, make special findings as provided by Rule 23(c).

The Court following such request, directed counsel for the parties to submit suggested findings to aid the Court in preparing same. This has been done.

Now, from the evidence submitted in the case, the Court, after being fully advised in the premises and after having heard the arguments and statements of counsel, finds:

1. That the Court had jurisdiction over the crime charged herein and of the defendant.

2. That defendant was 23 years of age at the date of the alleged violation and was 24 years of age at the time of this trial.

3. Defendant, after being fully advised of his rights, voluntarily and knowingly and understandingly waived his right to a jury trial with the approval of his attorney and the Court and the consent of the government.

4. Defendant testified under oath and has stipulated that he was ordered to report for induction on December 20, 1965 and that he did not report as so ordered.

5. Defendant during the last three months has on at least two occasions made bonifide attempts to enlist in the Armed Services of the United States.

6. Defendant has made a serious and reasonable effort to enlist in the Armed Services to mitigate his conduct of refusing to report for induction but because of criminal charges pending against him he was refused enlistment by the Armed Services.

7. The failure of defendant to report for induction as directed by his Local Draft Board imposed a duty upon him to so report to the designated place, which he failed to do.

8. The defendant in court and throughout the trial of this case, and at all proceedings prior thereto, was the same person as charged in the indictment.

9. The government has proved by the evidence and the defendant has admitted that an order to report for induction was given and that the defendant as a registrant failed to report.

10. The evidence produced before the Court shows and establishes proof of guilt beyond a reasonable doubt of the crimes charged in the indictment.

DATED at Topeka, Kansas this 20th day of December, 1966.

United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JANUARY, 1968, TERM

JERAL BLISS NICKERSON, Appellant,	)	
vs.	)	Number 9381
UNITED STATES OF AMERICA, Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Darrell J. Skelton for Appellant;

Benjamin E. Franklin, Assistant U. S. Attorney, (Newell A. George, U. S. Attorney, on the brief) for Appellee.

Before MURRAH, Chief Judge, and LEWIS and HILL, United States Circuit Judges.

HILL, Circuit Judge.

Appellant was convicted of violating 50 U.S.C. App. sec. 462 in that he failed to report to his local Selective Service Board for induction into the Armed Forces.

The undisputed record shows a flagrant disregard for the orders of the Board over a period of more than two years. Nickerson first registered for the draft on July 14, 1960, with the Local Board at Leavenworth, Kansas, and was thereafter classified 1-A. He requested a personal appearance before the Board, which was granted, and on May 9, 1961, he was reclassified as 3-A by reason of having a family. This status soon changed and on July 12, 1961, he was reclassified 1-A. He was ordered to report for physical examination on November 12, 1963, but failed to so report. The Board then ordered him to report for induction on December 13, 1963, and after correspondence between the registrant and the Board, this order was cancelled and an order was issued for him to report on January 20, 1964, for a physical examination. Before that date Nickerson filed the special form requesting classification as a conscientious objector and then failed to report for the physical examination. Proceedings before the Board were thereafter stayed pending consideration of the claim to conscientious objector classification. After investigation this was rejected on September 28, 1965, and Nickerson was again classified 1-A.

For a third time he was ordered to report on October 18, 1965, for physical examination and again failed to so report. He was then ordered for induction on November 8, 1965. At the request of Nickerson's mother this induction date was postponed for reconsideration of the case. On December 13, 1965, the Director of State Selective Service directed the

Board to withdraw the postponement and to notify registrant to report to the Local Board on December 20, 1965, for forwarding to the Induction Center. Such order was sent to Nickerson and on December 20 he failed to report. This failure was the basis for the indictment.

A jury trial was waived and trial of the case was had to the court. Appellant's sole defense was that his classification as 1-A was improper because of his status as a conscientious objector. The trial court found him guilty as charged thus finding that there was a basis in fact for the Selective Service Board's classification of appellant as 1-A and denial of the 1-O conscientious objector classification. At appellant's sentencing it was first mentioned that he had pending against him a felony charge in the State of Kansas for child desertion and non-support.

This appeal was taken from that conviction. Thereafter a Motion to Remand was made in this court by appellant for the purpose of the taking of further evidence in the trial court to show that as of July 22, 1964, appellant had been charged with a felony in the State of Kansas for non-support of his minor child and that appellant did not have counsel during the administrative procedure leading to his classification. The Motion to Remand was heard by this court at the same time we heard the argument by counsel on the merits of Nickerson's appeal.

Virtually the same arguments are raised by appellant on the Motion to Remand and the appeal. Actually, it is admitted that the trial court decision was valid in finding that the Local Board had sufficient grounds for not classifying appellant as a conscientious objector. Appellant's first argument here is that he was unconstitutionally deprived of an attorney in his appearances before the Selective Service Board. It was specifically considered and decided by this court in United

States v. Capson, 10 Cir., 347 F.2d 959, that a registrant is not entitled to the assistance of counsel under the Sixth Amendment for his appearances before the Selective Service Boards for classification. There have been no Supreme Court decisions on this question since our decision in Capson and appellant presents no new arguments to suggest that this decision should be reversed. Therefore, we must hold that appellant was not unconstitutionally deprived of counsel at any stage of the proceedings before the Board.

A hearing was had upon the claim to a conscientious objector classification before the local hearing officer of the Department of Justice in Kansas City, Kansas, who found the registrant's objections to military service to be not sincere and recommended the denial of the claimed classification. This hearing officer, in his report to the Department of Justice, did comment that "resume contained the worst report he had ever read on any registrant * * * and that the registrant probably would be of no service to the United States Government * * * ." Because of the statement contained in the record before the trial court, appellant argues that the court should have determined that he was not a proper person to be inducted. There is no merit to this contention. The hearing pertained only to the substance of the claimed conscientious objector classification and the hearing officer only recommended a denial of that classification. The Local Board followed the Department of Justice recommendation and denied the classification. Thereafter, within its authority, the Board gave appellant a 1-A classification.

Additionally, appellant argues that as a result of not having counsel in his appearance before the Selective Service Board he was not cognizant of the significance of the felony charge pending against him and that had this information been presented to the Board it would have been obligated by Army Regulations to have classified appellant 4-F. Appellant,

therefore, concluded that his classification was improper and that he could not be convicted for failure to submit to his order for induction. This argument fails on its merits for several reasons. First, appellant is not entitled to an absolute exemption simply because he has a felony charge pending against him. Section 456(m) of 50 U.S.C. App. is the only section of the statute which remotely relates to appellant's position. This subsection provided that: "No person shall be relieved from training and service under this Title * * * by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year." This clearly does not apply to the case of a registrant who has a felony charge pending against him. Additionally, it has been held that even a registrant who has a felony conviction must report to his local board notwithstanding the fact that he might eventually be granted a 4-F classification as section 456(m) was enacted for the benefit of the Armed Services and not the registrant. See Doty v. United States, 8 Cir., 218 F.2d 93. In all probability had the Local Board known of the pending felony charge against appellant it would have delayed his classification until such time as the charges were resolved. However, it is clear that the burden rests upon the registrant to present information concerning his classification to the Board[1] and having failed to do so he may not now validly claim that his classification of 1-A was illegal.

Appellant further argues to this court that Armed Forces Regulation AR 601-270-23 requires that any person having a felony charge pending against him be declared unacceptable for induction.[2] Answering this argument it may first be noted

1/ Dickinson v. United States, 346 U.S. 389; Carlson v. United States, 10 Cir., 364 F.2d 914.

2/ AR 601-270-23(d) states: "Men who have criminal charges filed and pending against them alleging a violation of a State * * * statute are unacceptable * * * ."

that a local Selective Service Board is a part of the executive branch of our government and is not controlled by Army Regulations. It is true that the Board works in conjunction with the Armed Forces. But the Army Regulation cannot be applicable until the inductee passes into the control of the Armed Forces[1]. Therefore, the order of induction could not be invalidated by the existence of this Army Regulation. The Regulation does apply to that part of the induction procedure for handling those registrants who are ordered to and do appear for the physical examination prior to induction. Such examinations are conducted by the Armed Forces. Had appellant appeared as ordered for any of his physical examinations the existence of the pending felony charge probably would have been discovered by the examining authorities and he could have been declared unacceptable for immediate induction. Appellant, however, did not appear as ordered for the examinations. Appellant's failure to appear for his pre-induction examination at which time final determination of physical and moral qualifications are made precluded the applicability of the Army Regulation.

As stated above, appellant's record shows that he repeatedly disregarded orders to report for pre-induction physical examinations and for induction. Therein lies the cause of his present difficulties. The fact that had he reported as ordered it is probable that his actual induction would have been postponed until such time as the felony charge pending against him had been terminated does not present a valid defense for appellant's conviction and thus even had the information been presented to the court below the trial judge would have been required to find that appellant was guilty of violation of 50 U.S.C. App. sec. 462.

Appellant's Motion to Remand is denied and the judgment is AFFIRMED.

1/ See Billings v. Truesdell, 321 U.S. 542.